A **SOON TEIK DEVELOPMENT SDN BHD**

v.

LIEW TUO CHEE & ORS

B COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-926-2006]
C 18 AUGUST 2011

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Terms of agreement - Delivery of vacant possession - Issuance of architect's certificate - Whether it was certificate of practical completion* D *- Whether tantamount to delivery of vacant possession - Whether action time barred*

LAND LAW: *Sale and purchase of property - Sale and purchase agreement - Terms of agreement - Delivery of vacant possession - Issuance of architect's certificate - Whether it was certificate of practical completion* E *- Whether action time barred*

This was an appeal by the defendant against the decision of the High Court, allowing the plaintiffs' claim for liquidated damages. The defendant was the developer of a commercial complex and F the plaintiffs were the purchasers for the individual units in that complex. The plaintiffs brought a claim against the defendant for failing to deliver vacant possession of the respective units specified in the Sale and Purchase Agreement ('SPA') dated 27 September 1995 and 26 October 1995 respectively. Their claim was allowed, G hence this appeal. The defendant made the following submissions: (i) the architect's certificate served to inform the defendant as the developer that the units specified in the said certificate were completed practically for the purposes of delivery of vacant possession and as the plaintiffs' units were stated in the certificate H it was deemed to have been completed; and (ii) the plaintiffs' claim was time barred as they have filed their application six years after the completion of the SPA. The plaintiffs submitted that the said certificate was not the Certificate of Practical Completion ('CPC') stipulated under cl. 25 of the SPA as it was merely the I architect's schedule of payment-progress. They submitted that the

date of delivery of vacant possession was 2 October 2002 when the property was certified as safe for occupation *ie*, on the issuance of the Certificate of Fitness of Occupation.

Held (dismissing the appeal; affirming decision of High Court judge)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) Under cl. 25 of the SPA, it was incumbent upon the defendant to produce a copy of the architect's CPC. The said certificate issued by the architect was not a CPC envisaged by cl. 25. Similarly the notice on the schedule of payment was not a certificate that the construction of the units purchased by the plaintiffs had been completed for vacant possession to be delivered. The learned judge was right in ruling that the architect's schedule of payment progress was not the CPC but plainly a notice of the schedule of payment. Furthermore there was no provision which allowed the defendant to issue a vacant possession notice without the CPC. (para 18)

(2) The plaintiffs' claimed was clearly not time barred as the Certificate of Fitness of Occupation was issued on 2 October 2002 and the plaintiff filed the application on 8 March 2005. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh defendan terhadap keputusan Mahkamah Tinggi membenarkan tuntutan pihak plaintif untuk ganti rugi. Defendan adalah pemaju kompleks komersial dan pihak plaintif adalah pembeli unit individu kompleks itu. Pihak plaintif telah membawa tuntutan terhadap defendan kerana gagal menyerahkan milikan kosong unit masing-masing seperti dinyatakan dalam Perjanjian Jual Beli ('SPA') yang bertarikh 27 September 1995 dan 26 Oktober 1995. Tuntutan mereka dibenarkan, oleh itu perayu telah merayu. Defendan mengemukakan alasan-alasan berikut dalam rayuan: (i) sijil arkitek itu bertujuan untuk memaklumkan defendan sebagai pemaju bahawa unit-unit yang dinyatakan dalam sijil itu telah siap untuk tujuan penyerahan milikan kosong dan unit pihak plaintif telah dinyatakan dalam sijil itu, dan ia dianggap telah siap; dan (ii) tuntutan pihak plaintif adalah dihadkan oleh masa kerana mereka telah memfailkan permohonan mereka enam tahun selepas

A SPA selesai. Plaintif berhujah bahawa sijil tersebut bukan Sijil Penyiapan Praktikal ('CPC') yang ditetapkan di bawah perenggan 25 SPA kerana ia adalah semata-mata jadual pembayaran. Mereka berhujah bahawa tarikh penyerahan milikan kosong jatuh pada 2 Oktober 2002, apabila unit-unit itu disahkan sebagai selamat untuk B diduduki, iaitu apabila Sijil Layak Menduduki dikeluarkan.

Diputuskan (menolak rayuan; mengesahkan keputusan hakim Mahkamah Tinggi)

Oleh Zaleha Zahari HMR menyampaikan penghakiman C mahkamah:

(1) Menurut perenggan 25 SPA, ia adalah tanggungjawab defendan untuk menghasilkan salinan CPC arkitek. Sijil arkitek itu bukan salinan CPC yang dibayangkan oleh perenggan 25. Begitu juga dengan notis jadual pembayaran, ia bukan suatu D perakuan bahawa pembinaan unit-unit yang dibeli oleh pihak plaintif telah siap bagi penyerahan milikan kosong. Yang arif hakim betul dalam dapatan-dapatannya bahawa jadual pembayaran itu bukan CPC tetapi ia adalah suatu notis jadual pembayaran. Selain itu, tiada peruntukan yang membenarkan E defendan untuk mengeluarkan notis penyerahan milikan kosong tanpa salinan CPC arkitek.

(2) Permohonan pihak plaintif tidak dihadkan oleh masa kerana Sijil Layak Menduduki telah dikeluarkan pada 2 Oktober 2002 dan F pihak plaintif telah memfailkan permohonan mereka pada 8 Mac 2005.

Legislation referred to:
Contracts Act 1950, s. 56(3)

G *For the appellant - Lim Fang Say; M/s Henry Lim & Co*
For the respondent - Dato' Harpal Singh (Harvinder Kaur with him); M/s Af Ariffin, Yeo & Harpal

Reported by Melinda Robert

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JUDGMENT

Zaleha Zahari JCA:

I **[1]** *Vide* originating summons filed on 8 March 2005 the plaintiffs (respondents in this appeal) claimed for liquidated damages against the defendant (appellant in this appeal) for failure

to deliver vacant possession of the respective unit which they purchased from the defendant within the time specified in the respective Sale and Purchase Agreement, interest as well as costs. The High Court Kuala Lumpur on 5 October 2005 allowed the plaintiffs' claim. The defendant appealed.

[2] The principal issue for determination before the High Court, as well as on appeal before us is, what is the construction to be given to the Architect's Certificate dated 22 December 1997 (exh. EP3) held out in the affidavit of Liew Tuo Chee affirmed on 7 February 2005.

Background

[3] The background facts are these: The defendant is the developer of a commercial complex known as Endah Parade situated at Taman Sri Endah Phase 3, Bandar Baru Sri Petaling, Kuala Lumpur. Liew Tuo Chee (the 1st plaintiff) by Sale & Purchase Agreement dated 26 October 1995 purchased Unit No. 3-082 at a purchase price of RM118,518 whilst Lee Yan Ping and Liew Cheng Tong (the 2nd plaintiff and 3rd plaintiff) by Sale & Purchase Agreement dated 27 September 1995 purchased Unit No. 1-015 at a purchase price of RM247,050 ("the SPA").

[4] The relevant clauses referred to in argument in this appeal are these: Clause 24.1 of the SPA states that the defendant is to deliver vacant possession of the respective unit purchased within 36 months from the date of the SPA. Clause 24.2 states that failure by the defendant to do so within this period entitles the plaintiffs to be paid Liquidated and Ascertained Damages (LAD) at a rate of 10% on such portion of the purchase price paid.

[5] Clause 25.1 then provides as follows:

> 25.1 Upon issuance of the Certificate by the Vendor's Architect certifying that the construction of the Property has been practically completed in accordance thereof ... the Vendor shall permit the Purchaser into possession of the Property PROVIDED THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the Property until such time as the Certificate of Fitness for Occupation for the Commercial Complex and/or the Property is issued.

A 25.2 Upon the expiry of the 14 days from the date of a notice from the Vendor requesting the Purchaser to take possession of the Property, whether or not the Purchaser has actually entered into possession or occupation of the Property, the Purchaser shall be deemed to have taken delivery of vacant possession whereupon the Vendor shall cease to be responsible howsoever for any loss or damage to the Property and/or to the fixture and fittings thereon/therein.

[6] The defendant is required to take steps to procure a Certificate of Fitness for Occupation of the units purchased by C cl. 26.1 of the SPA which provides as follows:

The Vendor shall do all acts and things necessary to procure the issuance of the Certificate of Fitness for Occupation in respect of the Property at its own cost and expense, and shall duly comply with all the requirements of the Appropriate Authority which are necessary for the issuance of the Certificate of Fitness of Occupation in respect of the Property.

[7] On the facts of this case the Architect had issued a Certificate dated 22 December 1997 bearing the heading E "Schedule of Payment – Progress Payable" of which Item 3 states as follows:

Item	Stage Of Completion	%	Units/Lot No. Compeleted	No. Of Units
3.	Upon handing over of vacant possession together with water pipes and electrical cabling ready for connection to the Property	2.5	Grd. Flr. All Completed (17 units) 1st Flr. All Completed (119 units) 2nd Flr. All Completed (145 units) 3rd Flr. All Completed (120 units) 4rd Flr. All Completed (71 units) 5th Flr. All Completed (11 units) 6th Flr. All Completed (1 units)	

The defendant then issued a letter dated 2 January 1998 which *inter alia* states as follows:

> We are please to inform you the construction of the above mentioned unit purchase by you is now completed and the vacant possession of the unit is ready for deliver. A copy of the Architect Certificate of Completion is enclosed herewith for your reference.
>
> You are required to call at our office at the above address during office hours and within 14 days from the date hereof bringing along with you your payment for the amount of RM3,269.48 as pert the statement of account attached.
>
> If you are purchasing the unit by way of end financing, you are to note that prior to your calling at our office, please ensure that your end financier has paid the progress payment of RM5,925.93 to us and has also deposited 2.5% of the purchase price with our solicitors as a stakeholder.
>
> Please note that upon the expiry of the 14 days from the date of this notice, you are deemed to have taken vacant possession of the above unit whether or not you have actually entered into possession or occupation of the unit and the 6 months defects liability period shall commence from this date.
>
> ...

[8] On 20 October 2002 Dewan Bandaraya issued to the Architect the Certificate For Occupation for the said complex.

The High Court Judge's Decision

[9] The High Court Judge ruled that "exh. EP3" was not a Certificate of Practical Completion envisaged by cl. 25 of the SPA for the following reasons:

> Having heard the submissions of the parties, I would agree entirely with the counsel for the Plaintiffs that the document's (architect's certificate) was not such a certificate of practical completion as required under Clause 25 of the Agreement.
>
> It is only a document which certifies the stages of completion of the shop lots ...
>
> A certificate by an architect certifying practical completion must be a document that leaves no doubt on the face of the document that the construction of the building has been practically completed leaving no room for those who rely on it to say otherwise.

A In my view therefore the document (architect's certificate) fell short of this requirement. It is at most a very vague and inconclusive statement ...

This certainly cannot be a certificate of practical completion of the building.

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Having determined that the document (architect's certificate) is not such a certificate, it follows therefore in the absence of a proper certificate of practical completion pursuant to clause 25 of the Agreement being issued, the shop lots must be presumed to have not been completed until the issuance of the certificate of fitness for occupation (CF) or anytime before.

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[10] The judge then allowed the plaintiffs' application with costs.

The Appellant Counsel's Submissions

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[11] Time, according to the appellant's counsel, was no longer of the essence, by reason the failure of the plaintiffs to issue a notice under s. 56(3) of the Contracts Act 1950. They are deemed to have waived their rights to do so.

E **[12]** The word "Property" is defined as the plaintiffs' units, not the entire complex. The words "practically completed" must be read together with s. 3 of the Second Schedule of the SPA, and when read together, must be construed to mean that cl. 25.1 is satisfied upon completion up to the stage of electrical cabling F ready for connection to the plaintiffs' units. The words "vacant possession" in cl. 24 must be distinguished from "right of occupation" in cl. 26. "Vacant possession" means completion of the individual units up to the stage of "electrical cabling is ready for connection to the Property".

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[13] The appellant's counsel submitted that the Architect's Certificate dated 22 December 1997 serves to inform the defendant (as developer) that the units specified in the said certificate had been completed practically for the purpose of H delivery of vacant possession. This Architect's Certificate was the certificate envisaged under cl. 25.1. As the plaintiffs' units was situated on the 3rd Floor and the 1st Floor respectively, their units are therefore deemed to have been completed. The letter dated 2 January 1998 to the plaintiffs, expressly states that the I plaintiffs are deemed to have taken vacant possession of their

respective units even if they did not take actual possession or occupation of the relevant unit. The appellant's counsel submitted that upon issuance the notice dated 2 January 1998 (which date is prior to the Completion Date) the defendant had delivered vacant possession in accordance with cls. 25.1 and 25.2.

[14] The defendant had applied for the Certificate of Fitness and obtained the same on 2 October 2002.

[15] Even if one were to accept that the Completion Date of the SPA was 26 October 1998 and 27 September 1998 respectively, as the plaintiffs' application was filed more than six years from the Completion Date (ie, on 8 March 2005), the appellant's Counsel submitted that the claim was therefore time-barred.

The Respondents' Counsel's Submissions

[16] Clause 25 makes it mandatory for the Architect's Certificate of Practical Completion to be attached to the delivery of vacant possession notice certifying that the construction of the property purchased had been practically completed. On the facts of this case the Defendant only submitted a copy of the Architect's "Schedule of Payment-Progress report" as opposed to the "Certificate of Practical Completion" envisaged in cl. 25. The learned judge was therefore right in ruling that the Architect's "Schedule of Payment-Progress" payable notice dated 22 December 1997 is not the Certificate of Practical Completion envisaged under cl. 25 but plainly a notice of the Schedule of payment. There was no provision allowing the defendant to issue a vacant possession notice without a Certificate of Practical Completion. There is no evidence of the appellant having complied with cl. 25 before issuing the notice which they did on 2 January 1998. The defendant had accordingly failed to deliver vacant possession of the units purchased in accordance with cl. 25.

[17] It is a prerequisite that a property should be certified as safe for occupation and Form E must be duly acknowledged and accepted by the relevant authorities before vacant possession can be delivered (Bylaw 25 of the Uniform Buildings Bylaws, 1984). From the evidence, the date the appellant delivered vacant possession was on 2 October 2002.

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Decision

[18] Under cl. 25 of the SPA it is incumbent upon the appellant to produce a copy of the Architect's Certificate of Practical Completion. We are in agreement with the learned judge that the
B document issued by the Architect which formed the thrust of the defendant's defence was not a Certificate of Practical Completion envisaged by cl. 25. We agree with the learned judge that a "Notice on the Schedule of Payment" was certainly not a certificate that the construction of the units purchased by the
C plaintiffs' had been practically completed for vacant possession to be delivered. There was no provision allowing the defendant to issue a vacant possession notice without a Certificate of Practical Completion. The defendant clearly had failed to comply with cl. 25 before issuing the purported vacant possession notices on
D 2 January 1998 which they did.

[19] As the Certificate of Fitness of Occupation was issued on 2 October 2002 and the plaintiffs' application filed on 8 March 2005, the plaintiffs' claim is clearly not time-barred.

E **[20]** The appeal is dismissed. The decision of the learned High Court Judge was affirmed. Costs of RM5,000 to the respondent. The deposit to the respondents to account of costs.

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